ORISSA HIGH COURT, CUTTACK

CIVIL REVISION NO.440 OF 1998

From an order dated 23.10.1998 passed by Shri R.C.Patnaik, District Judge, Cuttack, in Title Appeal No.124 of 1996, arising out of the judgment dated 30.10.1996 passed by Shri D.K.Tripathy, 1st Addl. Civil Judge (Sr. Division), Cuttack, in Title Suit No.456 of 1987.

Golam Mahammad & another ..... Petitioners

Versus

Sk. Fakir and others ..... Opp. parties

For Petitioners - M/s S.K.Dash, B.Mohapatra, S.K. Misra, S.K. Dash and C.S. Dash.

For Opp.Parties - M/s R.C. Mohanty, R.K.Mohanty, D.K. Mohanty, N. Behuria, P.K. Rath and A.P. Bose.

PRESENT:-

THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of judgment - 21.12.2007

PRADIP MOHANTY, J. This revision is directed against the order dated 23.10.1998 passed by the District Judge, Cuttack, in Title Appeal No.124 of 1996 remanding the matter back to the trial court under Order 41, Rule 25 of the Code of Civil Procedure.

2. The case of the petitioners is that they, as plaintiffs, filed Title Suit No.456 of 1987 before the 1st Additional Civil Judge (Senior

Division), Cuttack for declaration of right, title, interest, and possession over the suit property, or in the alternative, for recovery of possession thereof. They also made a prayer for permanent injunction restraining the defendant-opposite parties from interfering with their peaceful possession over the suit property. The suit was decreed in their favour. Thereafter, the unsuccessful defendants preferred Title Appeal No.124 of 1996 before the District Judge, Cuttack. The appellate court, after hearing the parties, remanded the matter to the trial court under Order 41, Rule 25 C.P.C., which, according to the petitioners, is not proper.

3. Mr. Dash, learned counsel for the petitioners, submitted that the order of the appellate court remanding the matter back to the trial court after framing two additional issues with direction to take additional evidence is illegal and liable to be set aside. He also submitted that there is no discussion or finding by the appellate court that the issues already framed by the trial court were not sufficient to cover the new issues framed by it. He further submitted that there is no finding as to whether in spite of non-framing of issues, parties have adduced evidence knowing fully well about the question involved in the suit, and law is well settled that mere non-framing of specific issue will not be sufficient to set aside the judgment.

4. Mr. S. Mohanty on behalf of Mr. R.K.Mohanty, learned counsel for the opposite parties, on the other hand, submitted that since the lis has been kept pending before the appellate court awaiting the finding of the trial court on the additional issues, this revision is not maintaianable. He also submitted that the appellate court has rightly remanded the matter since no issue had been framed with regard to acquisition of title by way of adverse possession.

5. Parties, in support of their respective submissions, relied upon the following decisions:-

(1) 1987(2) OLR 157 (*Harmohan Misra and another -v- Anapurna Dibya and others*)

(2) 1998(2) OLR 598 (*Balaram Das and another –v- Ganesh Karan and another*)

(3) 2003(1) OLR (SC) 6783, Shiv Shakti Co-operative Housing Society, Nagpur –v- Swaraj Developers and others.

6. Perused the records, the decisions cited at the Bar and the provisions of law. With regard to the question of maintainability of the revision, after the amendment of the Code of Civil Procedure, the principle has been decided in Shiv Shakti's case (supra). In the instant case, two additional issues have been framed and the matter has been remanded to the trial court for taking evidence on those two issues under Order 41 Rule 25 C.P.C. That means, the lis is pending before the trial court as well as before the appellate court. Against an order under Order 41, Rule 25 C.P.C., no appeal lies to the High Court. In the cases of *Harmohan Misra* (supra) and *Balaram Das* (supra), it has already been held by this Court that revision is maintainable against such orders. Of course, these two decisions were rendered prior to the amendment to the Code of Civil Procedure. After judgment and order in the title suit, the opposite parties in this revision preferred title appeal to the court of the District Judge. By the impugned order, the appellate court remitted the matter back to the trial court after framing two additional issues and directed the trial court to take additional evidence on the new issues and to return the evidence together with its findings and reasons. This amounts to reopening of the suit for a limited purpose. By applying the proviso to Section 115(1) C.P.C. and in view of the ratio decided in Shiva Shakti's case (supra), the present revision is held to be maintainable.

7. The crux of the matter is whether the order of remand under Order 41 Rule 25 is justified or not. Rules 23, 23-A and 24 of Order 41 C.P.C. deal with the powers of remand by an appellate Court. Under Rule 23, the appellate court can pass an order of remand, if the trial court has disposed of a suit upon a preliminary point and the decree is reversed in appeal, directing what issue or issues are to be tried after remand. Rule 23-A

provides for an open remand under which the entire case is remitted back to the lower court for retrial. Under Rule 25, the appellate court retains the matter on its file and only calls for a finding by the lower court on some issue or issues where the lower court has omitted to frame or try any issue for determining any question of fact essential to the right decision of the suit upon merits. In this regard, the following observation made by this Court in Harmohan Misra's case clinches the issue :-

> "It is not the duty of a Court to necessarily record a conclusive finding and insist that the better should be brought on record by the parties for that purpose. The anxiety of the Court do not extend to that extent. If the evidence would not establish the right of the plaintiff or of the defendant, as the case may be, then the claim having not been proved would not be decreed and there the matter would end."

The above apart, Rule 24 empowers the appellate court to pronounce or determine the lis even after re-stating the issues where the evidence on record is sufficient to answer the re-stated issues.

8. In the instant case, the appellate court has passed the order of remand mechanically without coming to a finding whether the issues framed by the trial court were sufficient to cover the new issues framed by the appellate court. Nor is there any discussion as to whether in spite of non-framing of such issues, parties had adduced evidence knowing fully well about the question involved in the suit. Law is well settled that mere non-framing of a specific issue will not be sufficient to set aside a judgment if parties have led evidence and gone into trial knowing the real nature of dispute involved. The appellate court has only framed two issues and referred them for trial directing the trial court to take additional evidence required for those issues and return the evidence together with its finding to the appellate court. This, in the opinion of this Court, is not proper. Before passing the impugned order, the appellate court should have examined the

above aspects and should have seen whether the appeal could be disposed by taking recourse to the provisions of Order 41, Rule 24.

9. For the above reasons, this Court allows the Civil Revision, sets aside the impugned order, and directs the appellate court to dispose of the matter afresh within a period of four months after affording opportunity of hearing to both the parties.

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Pradip Mohanty, J.

Orissa High Court, Cuttack
December 21, 2007/***Nayak***